Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

OCT 19 1998

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	**MM Docket No. 97-234**
of the Communications Act	)	
-- Competitive Bidding for Commercial	)	
Broadcast and Instructional Television	)	
Fixed Service Licenses	)	
	)	
Reexamination of the Policy	)	**GC Docket No. 92-52**
Statement on Comparative Broadcast	)	
Hearings	)	
	)	
Proposal to Reform the Commission's	)	**GEN Docket No. 90-264**
Comparative Hearing Process	)	
to Expedite the Resolution of Cases	)	

To: The Commission - **Mail Stop 1170**

PETITION FOR RECONSIDERATION

1. Montgomery Communications, Inc. ("Montgomery") hereby petitions for reconsideration of the *First Report and Order* ("*Order*"), in the above-captioned proceeding, FCC 98-194, released August 18, 1998, implementing provisions of the Balanced Budget Act of 1997 by adopting general competitive bidding procedures to select among mutually exclusive applications for commercial analog broadcast service licenses. Montgomery requests that the Commission focus its attention on mutually exclusive broadcast applications, one of which was filed before July 1, 1997, and the other(s) of which was (were) filed after that date but before the Balanced Budget Act of 1997 was enacted. Comments were filed by Montgomery regarding these circumstances but were not addressed by the Commission in the *Order*. Montgomery also requests

reconsideration of the Commission's determination that low power television ("LPTV") interests will be deemed to be attributable mass media interests in determining an entity's eligibility for bidding discounts as a Designated Entity.

2. Montgomery's specific situation is as follows: On September 20, 1996, Davis Television Topeka, LLC ("Davis") filed an application for a construction permit for a new commercial analog television station to operate on Channel 43 at Topeka, Kansas, File No. BPCT-960920___. Montgomery operates an LPTV station on Channel 43 in Topeka (K43EO), which would obviously be displaced were the Davis application granted. Montgomery did not file its own application for the channel because the Commission imposed a "freeze" on requests to amend the TV Table of Allotments and on applications for television construction permits for vacant television allotments in the top 30 markets, which included the market for which Davis applied and there was no indication the Commission would be inclined to grant waivers of the "freeze".[1] In fact, according to the *Freeze Order*, the Commission was to return the applications along with any applicable filing fees.[2] However, threatened with the loss of its LPTV station, which currently provides Fox Network service to the Topeka market,[3] Montgomery decided that it should upgrade its LPTV station to full power and, on August 20, 1997, Montgomery filed a mutually exclusive application for the same channel in the same community (file number not yet assigned).

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[1] *See Advanced Television Systems and Their Impact on Existing Television Service*, Order, 76 RR 2d 843, (1987) (*"Freeze Order"*).

[2] *Freeze Order* at ¶3.

[3] Montgomery provides Fox network service to the Topeka ADI through a network of four LPTV stations.

There are two applications on file, so neither is a singleton. However, one was filed before July 1, 1997, and the other was filed after July 1, 1997.

New Filing Windows

3. The *Order* states that in the case of a singleton application, the Commission will open a filing window for competing applications; but where two or more applications were filed prior to July 1, 1997, the Budget Act requires the Commission to conduct competitive bidding among the existing applicants without allowing an opportunity for additional applications to be filed. The *Order* does not explicitly address Montgomery's situation, where there are mutually exclusive applications on file, but only one of them was filed before July 1, 1997. To the extent that the *Order* may treat this situation as a pre-July 1, 1997 singleton situation, in which a new filing window will be opened, Montgomery requests reconsideration and a determination that competitive bidding should be limited to itself and Davis.

4. Montgomery does not believe that Section 309(l) requires the Commission to invite new applications where one application was filed before July 1, 1997, and other mutually exclusive applications were filed thereafter. While the *Order* (at ¶105) states that such applications fall outside the scope of Section 309(j)(1), the only thing the language of Section 309(l) explicitly requires is that no new applications be accepted where there is more than one application, and <u>all</u> were filed before July 1, 1997. It does nothing further. The Conference Report, as relied upon by the Commission in its *Notice of Proposed Rule Making* in this proceeding, speaks to opening a new filing window only for a <u>singleton</u> application filed before July 1, 1997. The Commission should not extend the meaning of the Conference Report language by taking the position that it applies whenever the Commission has not opened a filing window or

established a filing deadline since July 1, 1997. The Conference Report itself addresses only the situation where "no competing applications have been filed." It notes that a reason why no competing applications were filed may have been that no window was opened, but it does not say that if competing applications were filed, the Commission must invite new competing applications.

5. Even if the Commission has the discretion to open a new filing window though not compelled to do so, it is not in the public interest to open such a window in Topeka. The Commission determined that it was not in the public interest to reopen the filing period for additional applications where there are pending mutually applications not subject to Section 309(l) where the relevant period or window for filing applications under previously existing procedures had expired. *Order* at ¶108. The Commission recognized that reopening filing windows would not expedite the disposition of the pending applications or the commencement of service to the public but rather could produce further delays. *Order* at ¶108. The same is true in the case where there is a pre-July 1, 1997, application and one or more other mutually exclusive applications filed thereafter -- a new filing window will cause a significant delay in the time when the public will receive service from a new station.

6. There will be no offsetting public benefit by reopening a filing window in Topeka, as there will already be competing bidders to ensure that the authorization is not awarded below market value, and the Commission's minimum reserve price will ensure that the public receives adequate value for the spectrum.[4]

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[4] Montgomery further believes that the provision of the Budget Act establishing rights as of July 1, 1997, but not giving notice of that fact until the legislation was enacted in September of 1997, constitutes an unconstitutional *ex post facto* law. Montgomery is aware that the appropriate (continued...)

Attribution for Designated Entity Status

7. Montgomery also urges that the "new entrant" bidding credit, whereby eligibility for bidding credits would be based upon the number of media interests an applicant possesses, including LPTV ownership interests, is directly contrary to previous Commission practices and the agency's statutory obligation to protect small, minority- and women-owned businesses.

8. Under to the *Order*, a determination of Designated Entity status for establishing bidding credits will be based in part on ownership of other media interests; and LPTV interests are attributable in making the determination. *Order* at ¶190. Attribution of LPTV interests works a significant hardship on LPTV operators seeking to improve their facilities and their service to the public. Further, it is contradictory to the Commission's previous treatment of LPTV ownership interests in other contexts.

9. In Montgomery's case, Montgomery is currently providing Fox Network service to Topeka on Channel 43 and should not be penalized in the bidding process for seeking to upgrade to full power status to continue providing that service. On the contrary, Montgomery should be encouraged to upgrade and should be permitted to qualify for Designated Entity status

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[4](...continued)
venue for a constitutional concern is a judicial challenge. *In re* Enforcement of Section 276(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation; Motion for Order to Show Cause and to Cease and Desist, *Memorandum Opinion and Order on Remand and Order to Show Cause*, FCC 98-226, at ¶26. Nevertheless, there is no reason for the Commission to wait for the courts to act rather than curing the problem itself, at least in the Topeka situation.

without regard to its ownership of Station K43EO. Such an approach would be similar to that taken by the Commission in *Knoxville Broadcasting Corp.*[5], where a UHF television station seeking to upgrade to a newly allotted VHF channel was given a decisive preference in a comparative hearing based on its track record of service to the same community -- a track record that Montgomery has in Topeka.[6]

10. Indeed, in light of their secondary spectrum status and limited geographic coverage, no LPTV station should be attributable at all in the Designated Entity determination. For these same reasons, LPTV stations are not attributable for any purpose under the Commission's multiple ownership rules.[7] Any number may be owned in any market.[8] If there is no concern about

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[5] 103 FCC 2d 669 (1986). *See also, Miner v. F.C.C.*, 663 F2d 152, 48 RR 2d 1069 (DC Cir. 1980).

[6] *See also, In re* Implementation of BC Docket No. 80-990 to Increase the Availability of FM Broadcast Assignments, *Second Report and Order*, 101 FCC 2d 638, 57 RR 2d 1607 (1985), where the Commission determined that it was in the public interest to afford some form of special consideration to daytime-only licensees when they applied for FM allotments in their community of license based upon many factors, including that the daytimers were a unique class of broadcast licensees operating under substantial restrictions which included limits on the amount of relief that could be provided due to requirements of other types of stations and so face substantial difficulties in expanding service to their communities and yet with a significant history of serving their communities. The same is true for LPTV stations which operate under significant technical restrictions and yet also serve their communities in spite of such restrictions.

[7] *See* §74.732(b).

[8] Indeed, the only circumstance where LPTV interests have been considered in the past for regulatory purposes (other than character disqualification) is in determining diversity preferences in awarding broadcast licenses by lottery. The Commission no longer has the authority to award licenses by auction, so LPTV interests are now not attributable for any regulatory purpose comparable to the Designated Entity determination process. Additionally, LPTV stations have been treated as relatively insignificant in the comparative hearing context. *See Global Information Technologies, Inc.*, 8 FCC Rcd 4024 at 4029 (1993), where the Review Board determined that the weight to be accorded to LPTV ownership interest for diversification purposes was minimal due

(continued...)

diversity in the multiple ownership context, there should be none in the auction context.[9] Besides the fact that there is no public policy reason to attribute LPTV interests, LPTV operators who have relied on existing rules and policies in building their businesses should not be penalized now when facing the auction regime.

Conclusion

11. Inviting competing full power TV applications where mutually exclusive applications are on file is not required by the statute, even if one or more applications were filed after July 1, 1997, and will be contrary to the public interest by delaying new service to the public. In addition, LPTV interests should not be included in the determination of bidding credits

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[8](...continued)
to the secondary nature of the LPTV service, its inherently limited coverage potential, and its minor significance in the media marketplace.

[9] If for some reason the Commission determines that LPTV ownership should be attributable, the attribution should be tailored to the facilities of LPTV stations. In determining compliance with national ownership limitations under §73.3555(e)(2)(i) of the Rules, households served by UHF stations are counted as only half, while households served by VHF stations are counted as whole. If full power UHF stations are counted as only half, it would be appropriate to count LPTV as no more than 10%, so that ownership of ten LPTV stations would be the equivalent of ownership of one full power station for diversification purposes.

in light of the Commission's established policy of not considering such interests for other purposes. Accordingly, Montgomery requests the Commission to reconsider and modify the broadcast auction rules as set forth in this Petition for Reconsideration.

Respectfully submitted,

Peter Tannenwald
Michelle A. McClure

Counsel for Montgomery Communications, Inc.

Irwin, Campbell and Tannenwald, P.C.
1730 Rhode Island Ave., N.W., Suite 200
Washington, D.C. 20036-3101
Tel. 202-728-0400
Fax 202-728-0354

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